92-1793

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

L. SHYRL BROWN AND ILA D. BROWN, PETITIONERS

VS

UNITED STATES, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

L. Shyrl Brown
Ila D. Brown
46 West First North
Richfield, Utah 84701
801-896-5730

QUESTIONS PRESENTED FOR REVIEW

1. Were we deprived of due process of law?
2. Did the district court have jurisdiction?
3. Did the assessment comply with the law (26 USC 6201) and regulation (26 CFR 301.6201-1)?
4. Was there a lawful lien to be foreclosed?
5. Were we unlawfully deprived of trial by jury on the merits of the assessment and trial by jury on the merits of the fraudulent conveyance?
6. Are the computer generated certificates of assessments and payments reliable, admissible, conclusive, relevelant or material in the absence of source documents (supporting documents), when they can not be cross-examined and when they are not supported by first person testimony subject to cross examination?
7. Are the assessments and/or the money judgment of the district court arbitrary, without rational foundation, in violation of the law, excessive, naked, null, or void?

NO._____

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PARTIES

L. Shyrl Brown and Ila D. Brown, Petitioners v United States, Respondent.

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The decision of the 10th Circuit is in appendix A. (p. 15). The rehearing in the 10th Circuit is in appendix B. (p. 22) The opinion of the district court is in appendix C. (p. 24) The Judgment, Foreclosure and Order of Sale is in Appendix D. (p. 28)

JURISDICTION OF THIS COURT

We seek review of the decision of the 10th Circuit, U.S. Court of Appeals decided Dec 23, 1992. Rehearing was decided Feb 12, 1993. Jurisdiction of this court is found under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

We rely upon Art. I, Section 8, Cl. 17, the 5th and 7th Amendments to the U.S. Constitution and 26 USC 6201, 6020(b), 7401, 7402, 7403 and 26 CFR 301.6201-1 as our defense against this civil action. These are found in Appendix E.

STATEMENT OF THE CASE

The United States (hereafter US) filed its civil action Feb 13, 1989, seeking to reduce federal tax assessments to judgment, set aside a fruadulent conveyance of real property and to foreclose federal tax liens. Jurisdiction was alleged under 26 USC 7402 and 28 USC 1340 and 1345. The complaint alleges the civil action was authorized as required by 26 USC "7401 and 7403. We answered the complaint March 2, 1989, generally denying the jurisdiction of the district court and generally denying the allegtions of the complaint. We moved the court to dismiss on these grounds or, in the alternative demanded trial by jury.

Trial by jury was denied and bench trial was held Feb 4 and 5, 1991. The Order and Judgment was filed Sept 25, 1991.

Our appeal to the 10th Circuit was denied and the lower court affirmed on Dec 23, 1992. Rehearing was denied Feb 12, 1993.

REASONS FOR GRANTING THE WRIT

This writ should be granted because (1) the lower decisions are in conflict with the law of the case, (2) the courts are in conflict over the issues involved, (3) the lower courts are in conflict with opinions of this court and (4) the lower courts have departed far from the demands of trial by jury, numerous issues of due process of law and rules of evidence, that they require supervision of this court. The issues are set down in greater depth below.

I. DEFECTIVE COMPLAINT

The complaint appears fatally defective. The complaint states: "3. The court has jurisdiction over this action pursuant to Section 7402 of the Internal Revenue Code of 1986 and Sections 1340 and 1345 of Title 28, United States Code."
The complaint fails to allege (a) violation of any particular federal law, (b) any particular law making Shyrl LIABLE for any particular tax, (c) any particular federal law granting jurisdiction to the district court to determine rights, title or ownership of real property in Richfield, Utah, (d) any particular law granting jurisdiction in a fraudulent conveyance action or (e) any particular law requiring Shyrl to file any particular return at any particular time for any particular purpose.

The complaint is not well pleaded. A federal question does not appear on the face of the complaint. The jurisdiction of the district court is in question. See Caterpillar Inc v Williams, 107 SCt 2425, 2429. It is the burden of US to allege and prove the jurisdiction. Denman v Great Western RR, 811 P2d 415, 418 (1990).

Therefore, we believe the complaint is fatally defective requiring dismissal of the civil action.

II. FAILURE TO FIND JURISDICTION

Even as the complaint fails to complete its jurisdictional allegation, the district court fails to find jurisdiction with particularity. The district court totally ignors the issue of jurisdiction for the word is not found in its decision. The 10th Circuit feebly addresses jurisdiction at p 16 . It cites Lonsdale v US, 919 F2d 1440. Lonsdale is a quiet title action in which Lonsdale alleged the jurisdiction of the court and that jurisdiction was not challenged by United States. The 10th Circuit follows by stating that the circuit "...rejected tax protester arguments (p. 16). Whether or nor arguments are entered or rejected does not establish jurisdiction to a legal certainty. The 10th Circuit refused to address the issues of district court jurisdiction.

It is long settled that the plaintiff must allege and prove jurisdiction. There is a presumption against district court jurisdiction. Jurisdiction can not be waived nor conferred upon a federal court by consent, inaction or stipulation and can not be expanded by judicial interpretation. Proof of jurisdiction must proceed to a legal certainty. A court lacking jurisdiction must dismiss the cause of action at any stage of the proceeding. Christiansen v Colt Ind., 108 SCt 2166, 2169-70; McNutt v GMAC, 56 SCt 780, 785; Thompson v Gaskill, 62 SCt 673, 675; Butler v Derwinski, 960 F2d 139, 140; Basso v Utah P&L, 495 F2d 906 (10th

Cir 1974); Amalgamated Sugar v Bergland, 664 F2d 818 (10th Cir 1981); Stone v US, 683 F2d 199 (DC, 1982); Ohio Nat Life Ins v US, 922 F2d 320, 324-5 (1990); Appeal of AH, 590 A2d 123, 129.

Therefore, the 10th Circuit appears in conflict with decisions of this court, other circuits and its own decisions.

III. LACK OF TERRITORIAL JURISDICTION

We contest the territorial jurisdiction of the district court. The complaint correctly states at No.4 and 5 that Defendants reside at 490 North First West, Richfield, Utah. It then alleges that the stated address is, "...within this judicial district and division". The complaint fails to allege with any particularity the lawful or constitutional grounds extending district court jurisdiction to that particular address in Richfield, Utah.

Generally, a state has complete jurisdiction over the lands within its exterior boundaries. State v Vaughn, 786 P2d 1051, 1054. Jurisdiction is territorial in nature. There are only three known lawful means whereby the United States can gain jurisdiction within the boundaries of Utah. (1) By purchase of lands from Utah with the consent of Utah Legislature (Art I, Sec 8, Cl 17, U.S. Constitution). (2) By the United States reserving jurisdiction in the Utah Enabling Act of 1894 (Utah Div of Pub Lands v US, 107 SCt 2318 (1987)). 3. Utah ceding jurisdiction to the United States for specific constitutional purposes (Utah Code, 63-8-1) and the United States officially accepting that ceded jurisdiction (Adams v US, 87 LEd 1421, 1423; State v Vaughn, supra. Also see Paul v US, 371 US 245, 269.

Congress may legislate with respect to Washington, D.C., its territories, and under certain conditions within federal enclaves within Utah (US v Jenkins, 734 F2d 1322, 1325) but may not legislate with respect to Richfield, Utah nor to we defendants who are citizens and residents of Richfield. Foley Bros v Filardo, 69 SCt 575 577. Other cases will be cited on the merits.

Statutes are governed by jurisdiction as well. James v Dravo Contracting Co. 302 US 134; Silas Mason Co. v Tax Comm of State of Washington, 302 US 186; Wilson v Cook, 327 US 474. This is particularly pointed out by comparing Pacific Coast Dairy v Dept of Agriculture of California, 318 US 285 and Penn Dairies v Milk Control Comm of Pennsylvania, 318 US 261.

The lower courts appear in clear conflict with and have refused to consider decisions of this court.

IV. SUIT NOT PROPERLY AUTHORIZED

26 USC 7401 prohibits commencement of this civil action for failure of the Secretary to authorize or sanction the pro-

ceeding. The US refused to produce the alleged authorization either upon our denial of authorization, our motions to dismiss, or by discovery. Further, on January 25, 1993, Shyrl submitted a Freedom of Information Request to IRS to attempt to secure authorization. That request has never been answered.

The 10th Circuit correctly found that Mr. Lusty, IRS trial lawyer, filed an unsworn declaration stating that a Marion K. Mortensen had requested this action. However, the actual letter has never been found nor entered in evidence. Mr. Lusty must produce the letter to satisfy the "completeness doctrine". Failure to produce the signed letter of authorization appears grounds for citing Mr. Lusty with perjury because the letter appears nonexistent, especially when this petition is considered as a whole.

> "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered with it." Rules of Evidence No 106.

The 10th Circuit continued that we, the Defendants, must go forward and produce the letter (p. 16).. Courts have recognized it is not easy and may be impossible to prove a negative. See Elkins v US, 364 US 206, 218; Weimerskirch v Comm 596 F2d 358, 361. We believe there never was any such letter and it is therefore impossible for either US or Defendants to produce.

Proof of jurisdiction is the burden of the US, this should include compliance with Section 7401. The annotated cases view this section as jurisdictional. Upon failure of the Plaintiff to prove the authorization, the suits have been dismissed. See US v One 1972 Cadillac, 355 FSupp 513 (1973); US v Twenty-Two Firearms, 463 FSupp 730 (1979). This court recognized the validity of the former statute (26 USC 3740) in Sullivan v US, 348 US 170, 171. This appears to support dismissal for failure to prove authorization as in the cases cited above and the 10th Circuit appears in conflict for failure to dismiss.

Grounds for review may include (1) no authorization letter in evidence, (2) if there was a letter, it is a deliberately concealed document obviously critical to Defendants defense, (3) the case proceeded in violation of the law, (4) the burden of proof of jurisdiction can not be imposed upon the Defendants and (5) the 10th circuit is in conflict with the above cases in the annotated code.

V. LIEN ENFORCEMENT

US claims it is enforcing a lien under 26 USC 7403 against Ila's real property. We deny the validity of this action in district court on these grounds: (1) The Secretary failed to request the civil action, and (2) there is no lien to enforce for failure to comply with the Utah Foreign Judgment Act.

"If the requirements of this chapter are satisfied, the foreign judgment becomes a lien upon the judgment debtor property on the date it is docketed." Utah Code, 78-22a-5(2). See Thompson v Avery, 39 P 829, 835 (1895); US v Kendall, 263 F 126, 127 (1920). Compliance with Utah law is an essential element to establish a lien in this case, rather than mere assessment of alleged tax for 26 USC 6322 clearly states: "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made." Clearly, the Utah Code specifically fixes another date and therefore there appears to be no lien to enforce because no judgment has been filed in Sevier County, Utah. (3) Ila's deed predates the alleged assessment by 11 years and predates any lawful US lien by at least 21 years. Thus, there is no lien to enforce. Aquilino v US, 363 US 509; US v Hershberger, 475 F2d 677, 681 (1973); Washington v US, 402 F2d 3, 7. (4) The civil action in the lower court was not an action to enforce a lien but a is a fraudulent conveyance action not authorized under 7403, nor is it proven to be under the jurisdiction of the district court. The 6th Ciruit ruled a tax lien can not attach to property which has been previously transferred by the taxpayer at the time the assessment is made. US v General Motors Corp, 929 F2d 245, 253 (6th Cir 1991). Of course, Shyrl has not been proven to be a taxpayer in relation to the alleged lien.

It appears the lower courts acted outside of their jurisdiction, abused their discretion, violated Utah law and are in conflict with decisions of this court and other circuits as cited above.

VI. UNLAWFUL ORDER OF SALE

The district appears to have directly violated the law when it issued its Judgment, Order of foreclosure and Order of Sale (App D). Utah law states:

> "No execution or other process for the enforcement of a foreign judgment filed under this chapter may issue until 30 days after the judgment is filed." Utah Code, 78-22a-3(3).

The foreign judgment has not been filed as required by law and therefore the district court order is unlawful and in direct violation of the law.

VII. ASSESSMENT DOES NOT COMPLY WITH STATUTE

Relying upon 26 USC 6201 and 26 CFR 301.6201-1, the US (not the Defendants) must prove: (1) The tax is imposed by this title. (2) It is a stamp tax. (3) That Shyrl is the taxpayer (LIABLE at law for the tax). (4) That the tax was determined by the taxpayer or by the district director or the director of the regional service center and was disclosed on a return or list. (5) That the article(s) taxed was sold or removed for sale. (6) That the district director determined Shyrl was the person liable at law for the stamp tax. (7)That any transaction or act was a transaction or act which required payment of a tax by stamp. (8) That Shyrl refused to pay such tax at the time and in the manner provided by law or regulations (no law or regulation has been cited mandating my compliance). (10) That the alledged assessment had been made according to law and regulation (26 USC 6201 and its regulation).

> "Yet it is for Congress, not the courts, to write the law" Standard v Olesen, 74 SCt 768, 771.

Taxing acts are not to be extended beyond the clear import of the language used. US v Meriam, 263 US 179, 187-8; Helvering v Stockholms Enskilda Bank, 293 US 84, 93-4; Gellman v US, 235 F2d 87, 89, 90, 93; Citizens Action League v Kizer, 887 F2d 1003, 1006 (9th Cir 1989).

Assessments made contrary to statute are illegal. US v Yellow Cab, 90 F2d 699, 701.

We believe the record will reveal that the US failed to prove even one element of the law and regulation. The lower courts appear in direct conflict with the law and cases cited above.

Thus, the 10th Circuit, in citing US v McMullin, 948 F2d 1188, 1192 appears wholly off point and in direct violation of 26 USC 6201. Further, Section 6201 and its regulation is not raised nor decided in McMullin. When there is no assessment at law, the complaint is fatally flawed, there is no lien at law and no cause of action.

The 10th Circuit found (p. 18) that Shyrl had not filed returns for the years in question. There is no evidence or discovery that the Secretary executed any returns in compliance with 26 USC 6020(b). There is no list of taxable articles in evidence. Therefore, it further appears the alleged assessment is void for failing to specifically comply with 26 USC 6201(a)(1). US must produce its evidence.

> "In either event, under Williams Packing the relevant facts are those in the Government's possession and they must somehow be obtainable from the Government."

Comm v Shapiro, 424 US 614, 628. Also, the government must prove the essential elements. Weir v US, 716 FSupp 574, 577.

Congress further reveals its intent that assessment in 6201 refers only to STAMP TAXES. In 1954, The House Report, 83d Congress, 2d Session, 1954, Excise Tax Reduction Act, p. 4552 is quoted as follows:

> "6201. Assessment Authority. This section makes two material changes from existing law. The first permits the assessment of the amount of any check or money order, given in payment for stamps, which is not duly paid."

6201 was found valid by the Sixth Circuit in Cole v Cardosa, 441 F2d 1337, 1342, and the issued appeared well settled until the 10th Circuit refused to consider the law of the case. 26 USC 6021 refers to lists of taxable articles. This court recognizes the concept of STAMP TAXES in Skinner v MidAmerica Pipeline Co. 109 SCt 1726, 1732. This court continues generally discussing the Internal Revenue Code but has not specifically ruled upon 6201 to our knowledge. The code is remarkably specific (Id p. 1732. The regulations determine how the internal revenue laws shall be applied (Id p. 1732).

> "(It is 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.')" Skinner, supra p. 1371.

We have been denied access to the lower courts because they refused to consider the law. We believe these rules should be NARROWLY applied (Id p 1733) to 6201 and its regulation.

VIII. TRIAL BY JURY

Defendants are guaranteed trial by jury under the 7th Amendment, U.S. Constitution. Defendants were denied trial by jury on the merits of the assessment and the merits of the fraudulent conveyance.

The 10th Circuit cites US v McMullin, 948 F2d 1188. At page 1190 it extensively documents that with respect to a money judgment Shyrl is entitled to jury trial. It cites Ross v Bernhard, 936 US 531,538...; Dairy Queen, Inc v Wood, 369 US 469, 473, n. 4...; Skinner v Total Petroleum Inc 859 F2d 1439, (10th Cir 1988), US v State of New Mexico, 642 F2d 397, 399-400 (10th Cir 1981); US v McMahan, 569 F2d 889 (5th Cir 1978). The 10th Circuit obviously disagrees with its own citations. We believe the cases it cites represent the correct opinions. We think that when a jury is confronted on-

ly with computer generated documents, knowing the nature of such documents (garbage in - garbage out), in the absence of any supporting documents or source documents, which appear to be in direct violation of the law of the case and regulations, and in the absence of any support of first hand testimony subject to cross examination, a jury may well have reached a different conclusion as to the money judgment. We believe the court violated the 7th Amendment by denying a jury trial.

Ila was denied a jury trial on the alleged fraudulent conveyance in a competent Utah court.

We believe that a jury, which would hear ALL the testimony, see a deed dated 1972, and hear other information in the trial, it may well reach another conclusion.

Numerous courts have ruled that fraudulent conveyance actions are subject to jury trial. Watson v Watson, 607 A2d 383 (1991); Johnson v Estate of Rayburn, 587 NE2d 182 (1991); Tyers v Coma, 570 A2d 186 (1990); Territorial Sav & Loan Assn v Baird, 781 P2d 452 (1990); Smith v Greenwood, 278 SE2d 380 (1981); Goodman v Lewis, 277 SE2d 908 (1981)

The 10th Circuit errs in stating the lower trial was an equity proceeding to enforce a lien. Since there is no lien at law, there can be no enforcement proceeding for the nonexistent lien. The civil action was a fraudulent conveyance action, (clearly a jury matter according to the above cases), and was held in a court which did not have jurisdiction over the subject matter nor the property.

This court should protect our right to jury trial.

IX. CERTIFICATES OF ASSESSMENT

The Certificates of Assessment and Payment (hereafter Certificates) are recognized as computer summaries of many taxes and were admitted as public documents, business records exception to the hearsay rule. . (See 10th Cir III Evidentiary Matters). We contest the RELIABILITY of the certificates and contend they should not have been admitted.

The Certificates by themselves, without foundation, and without first person testimonial support appear generally inadmissible.

> With respect to past recollection recorded, "1) the witness must have had firsthand knowledge of the event; 2) the written statement must be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it; 3) the witness must (sic) (not) lack a present recollection of the

event, and 4) the witness must vouch for the accuracy of the written memorandum." Hammel v Christian, 610 A2d 979, 982-3.

Also, for computer printout to be admissible under business record exception to hearsay rule, entries must be made in regular course of business at or reasonable near the time of the events they record, and trial court must be satisfied that sources of information and mode and time of preparation indicate sufficient trustworthiness to justify admission. Lenzini v Columbia Foods, 829 SW2d 482, 485.

These cases compare favorably with International Harvester, infra.

(1)The certificates are summaries of taxes and do not, on their face, identify Shyrl as LIABLE for any tax. (2) The alleged taxes for 1971 were assessed in 1983, raising a strong presumption against reliability. Similar delays are seen for each alleged year raising the question of recording the alleged liability in a normal course of business activity. (Dist. Court. p. 28). (3) The 10th Circuit never found that the assessment complied with 26 USC 6201 (above) and refused to consider the law of the case. (4) The certificates are certified as being based upon SUPPORTING DOCUMENTS and subject to correction. In the absence of the supporting documents they appear unreliable.

The 10th Circuit regards the certificates as conclusive in the absence of the supporting documents. The 2d Circuit in US v O'Connor, 291 F2d 520, 527 (1961), distinguished between conclusive and presumptive but inconclusive certificates. That circuit held that the certificates are presumptive but inconclusive. Similarly, Coson v US, 169 FSupp 675-6 (SC Cal, 1958), held that since the supporting documents are not in evidence, the certificates are not conclusive. Also, see footnotes 15, 16, p. 675. This same position is taken by the 5th Circuit when it recognized that there are no reported cases allowing certificates in evidence over objection without the underlying official record. US v Buford, 889 F2d 1406, 1408 (1989). Also, admissibility of computer documents is dependent upon the source of the information and trustworthiness, which burden of proof is upon US. Diversified Financial v Maderak, 811 P2d 1237, 1240 (1991).

We have shown above that it is extremely unlikely that there are any documents supporting the certificates (26 USC 6201(a)(1)). We believe the only proper method of proving the certificates trustworthy and admissible it to compel the US to produce the alleged supporting documents and then compare these

documents to the certificates and the law of the case. The US must produce the documents according to Comm. v Shapiro, supra 424 US at 628.

Therefore, we attack the 10th Circuit's conclusion of no SUBSTANTIAL EVIDENCE. Our ARGUMENT is that the assessment does comply with the statute (26 USC 6201), that there are no supporting documents, that no district director found Shyrl liable for any tax, under any specific law, and we were denied our right to cross examine the computer generated hearsay certificates, under oath, to establish whether or not they are trustworthy, reliable, relevant and material.

Therefore, we believe the certificates are unreliable and inadmissible.

Presumptions are not evidence, and they disappear in the face of substantive evidence tending to disprove them. Union Pac R Co v US, 524 F2d 1343. Neither possibilities nor assumptions can take the place of evidence. Ragsdale v Paschal, 118 FSupp 280. The burden of proof remains upon the plaintiff to establish his substantive case. O'Brian v Equitable Life Assurance, 212 F2d 383.

X. DUE PROCESS OF LAW

This court has established an important element of due process.

> "But it is entirely plain that to treat the statements in this report - based on an ex parte investigation and formulated in the manner herein set forth - as constituting in themselves substantive evidence upon the questions of fact here involved, violates the fundamental rules of evidence entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination." US v International Harvester, 274 US 693, 703. Compare 10th Cir EVIDENTIARY MATTERS.

The 10th Circuit errs in requiring us to produce the witnesses with first hand knowledge of the assessment. The US must produce the witnesses, we have the right to cross-examine. The 10th Circuit errs in saying we refused the district courts offer to make available two witnesses who executed the certificates. This appears in direct conflict with this court in that (1) The US must call its witnesses to establish the reliability of the supposed evidence; (2) The persons who signed the certificates are not iden-

tified as either a district director or a director of a regional service center (26 CFR 301.6201-1) and therefore have no first hand knowledge. The person who did make the assessments is not yet identified; (3) It is our right to cross examine (not directly examine as the 10th Circuit claims), under oath, the person having first hand knowledge of the alledged assessment; (4) The certificates themselves are not executed under oath and therefore are not reliable unless proven reliable by US witnesses.

Therefore, we believe the 10th Circuit is in conflict with this court and does violence to long standing and well settled demands of due process of law.

XI. FRAUDULENT CONVEYANCE

The district court apparently lacks jurisdiction and discretion to decide a fraudulent conveyance action. There is no law granting jurisdiction to the district court in a fraudulent conveyance action nor to decide rights, titles or ownership of real property in Richfield, Utah.

This court alluded to this jurisdictional issue in Aquilino v US, 363 US 509, 515 but did not directly decide this issue. This appears an important jurisdictional issue. It is well settled that, "A statute can not extend federal jurisdiction beyond the limits of the Constitution." Hodgson v Bowerbank, 9 US 303 (1809), 1 Fed Proc, LEd 1.1. In this civil action, no particular statute is cited alleged to grant jurisdiction to the district court. Fraudulent conveyance does not arise under the Constitution, laws or treaties of the United States. Daviditis v Nat. Bank of Matton, 263 F2d 884, 886. Also, see Coll v Coll 690 FSupp 1085, 1090 (DC, 1988)

The lower courts have refused to address this jurisdictional issue and appear to be in conflict with the cited cases.

XII. ASSESSMENT AND JUDGMENT ARBITRARY AND VOID

Relying on the above, we believe this civil action falls into the category of cases in which the alleged assessment is arbitrary, fails to comply with the law and regulation, is without rational foundation, is excesive, & is naked where the alledged documents supporting the computer generated certificates do not exist. The assessment having been shown to be arbitrary, the money judgment must also be arbitrary as we have shown above. Helvering v Taylor, 293 US 507, 514; US v Janis, 428 US at 442; Carson v US 560 F2d 693, 696 (5th Cir 1977); Coleman v US, 704 F2d 326, (6th Cir, 1983;) US v Schroeder, 900 F2d 1144, 1148-9 (7th Cir 1990). When an assessment is erroneous, see Suarez v US 582 F2d 1007, 1010. Upon showing assessment arbitrary the

burden is then upon the government to show whether any deficiency exists and, if so, in what amount. Bar L Ranch Inc v Phinney, 426 F2d 995, 999 (1970). Even in tax court cases, with an arbitrary and erroneous assessment the government must prove the correct amount of any taxes owed. Portillo v Comm, 932 F2d 1128, 1133 (5th Cir 1991). This is not a tax court case. The burden of proof should be entirely upon the US to prove the allegations in its complaint. It should be viewed as any other civil action for any other kind of alleged debt with traditional protections for the Defendants.

The lower courts proceeded entirely upon presumption, from jurisdiction to fact and law. The US has not introduced any relevant evidence under oath. We believe the US failed to prove the allegations in its complaint.

Therefore, we believe the 10th Circuit is in conflict with the law, cases decided by this court, and in conflict with the other circuits cited above when it failed to find the assessments arbitrary and void and failed to reverse the district court decision and orders.

XIII. CONCLUSION

This appears to be a most unique case. This may be the first case in the country tried by computer. This may be the first case in which all facts are presumed. This may be the first case where the law of case is ignored. We believe we have shown conflicts with the law (26 USC 6201, 7401) which law has not been and should be decided by this court, conflicts with decisions of this court, conflicts with other circuits and district court decisions and that the 10th Circuit sanctioned the departure of the district so far from the usual course of judicial proceedings as to call for an exercise of this Court's supervision. We believe this Petition for Writ of Certiorari should be granted.

L. Shyrl Brown_____ Ila D. Brown_____

Petitioner, Defendant Petitioner, Defendant

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 91-4175 (DC 89-C-143J)

United States of America, Plaintiff-Counter-Claim Defendant-Appellee v L. Shyrl Brown and Ila D. Brown, Defendants-Counter-Claimants-Appellants.

ORDER AND JUDGMENT

Before Moore and Tacha, Circuit Judges and Saffels, Senior Judge

Honorable Dale E. Saffels, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appeallate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed R App P 34(a); 10th Cir R 34.1.9. The case is therefore ordered submitted without oral argument.

The United States brought this action against defendants L. Shyrl Brown and Ila D. Brown to reduce to judgment Mr. Brown's unpaid tax liability, to set aside as fraudulent Mr. Brown's conveyance of real property to Mrs. Brown, and to foreclose federal tax liens against the fraudulently transferred property. The district court entered judgment in the amount of $190,404.89, plus interest and statutory additions, for unpaid income taxes for the years 1971, 1972, 1973, 1977, 1978, 1980, and 1982, against Mr. Brown, the sole wage earner. The district court also set aside as fraudulent Mr. Brown's conveyance of his interest in his business property, upheld the tax liens– on the property, and ordered the property foreclosed and sold to satisfy the liens. Defendants appeal. We exercise our jurisdiction under 28 USC 1291, and affirm.

The real property that is the subject of the foreclosure and sale order was used by Mr. Brown for his dentistry business.[2] In 1972, Mr. Brown conveyed his undivided one-half interest in the property to his wife, defendant Ila D. Brown, who owned the other undivided one-half interest, resulting in title to the property in Mr. Brown's name. At about that time, Mr. Brown ceased paying federal income taxes. Mr. Brown continued to use the property for his business.

Defendants raise several arguments on appeal. In general, they maintain the government failed to establish a duty to pay taxes and failed to establish the district court's jurisdiction. They also claim (1) the action was not filed in compliance with 26 USC/7401 and 7403 requiring authorization for the civil action by the

Secretary of the Treasury and the Attorney General; (2) the district court erred in receiving and relying on various items of evidence; (3) the district court's findings of fact and law that the business property was fraudulent conveyed was incorrect; and (4) defendants were denied their right to a jury trial.

I. TAX PROTESTER ARGUMENTS

Defendants make several arguments that the district court was without jurisdiction. We review de novo the question of the district court's jurisdiction. Kunkel v Continental Casualty Co., 886 F2d 1269, 1273 (10th Cir 1989)

In Lonsdale v United States, 919 F2d 1440 (10th Cir 1990), we addressed and rejected many tax protester arguments, several of which were raised by defendants in this case to challenge the district court's jurisdiction. In Lonsdale we rejected arguments raised here by petitioners, hold that the following arguments ... are completely lacking in legal merit and patently frivolous: (2) the authority of the United States is confined to the District of Columbia; (3)...[various arguments against the government's power to impose income taxes on individuals; (6) the income tax is voluntary; (7) no statutory authority exists for imposing an income tax on individuals; [and](9) individuals are not required to file tax returns fully reporting their income... Id. at 1448. Also meritless is the argument that "the Commissioner of Internal Revenue and employees of the Internal Revenue Service have no power or authority to administer the Internal Revenue laws...because of invalid or nonexistent delegations of authority." Id. Accordingly, defendant's similar arguments are rejected as meritless.

II AFFIRMATIVE DEFENSE 26 USC 7401 & 7403

Defendants raised the affirmative defense that the government failed to comply with 26 USC 7401 and 7403(a), which require the authorization of the Secretary of the Secretary of the Treasury and the Attorney General before commencement of a civil action to collect taxes or enforce a tax lien. Defendants claim the civil action against them was filed without the requisite authorizations. Counsel for the government filed the following writtent statement:

3. By letter dated March 21, 1986 Chief Counsel, Internal Revenue Service by Marion K. Mortensen, District Counsel, a delegate of the Secretary of the Treasury, requested that an action be brought to reduce the federal tax assessments against L. Shyrl Brown to judgment, to set aside the fraudulent conveyance of two parcels of real property and to forclose the federal tax liens against L. Shyrl Brown.

4. I was instructed by Stephen Fuerth, Chief, Civil Trial Section, Western Region, Tax Division, U.S. Department of Justice to bring the present action. Mr. Fureth is a delegate of the Attorney General of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

R. Vol. I. doc 50 at 1-2. The record reflects that defendants did not respond to the government's statement. They neither came forward with evidence to controvert the statement nor challenged the form or the content of the statement. In pleadings filed after the government's statement of compliance with ""7401 and 7403(a), defendants merely reiterated their claim that the government had not complied with those sections.

Once the government offered some evidence of compliance with 7401 and 7403(a), defendants had the burden of going forward with evidence to establish their affirmative defense. See Simopoulos v Virginia, 462 US 506, 510 (1983) ("Placing upon the defendant the burden of going forward with evidence on an affirmative defense is normally permissible."); Patterson v New York, 432 US 197 207-08 (1977) (requiring defendant to carry burden of persuasion on affirmative defense of extreme emotional disturbance does not violate due process clause). Defendants failed to meet their burden. Therefore, because the government's evidence of compliance with 7401 and 7403(a) is uncontroverted, we determine defendants conceded that the government complied with those sections.

III EVIDENTIARY MATTERS

Defendants allege several evidentiary errors. First, they claim the government failed to produce sufficient admissible evidence to establish the taxes due from Mr. Brown.

In a suit brought by the government to collect taxes resulting from unreported income, the government generally establishes a prima facie case when it shows a timely assessment of the tax due, supported by a minimal evidentiary foundation, at which point a presumption of correctness arises. A presumption of correctness attaches to the Commissioner's assessment, once some substantive evidence is introduced demonstrating that the taxpayer received unreported income. This presumption will permit judgment in the Commissioner's favor unless the opposing party produces substantial evidence overcoming it.

United States v McMullin, 948 F2d 1188, 1192 (10th Cir 1991)(citations omitted).

In this case, the government introduced into evidence the certificates of assessment. The government then elicited testimony

from Mr. Brown that he had not filed a tax return showing his income since 1970, and that he had been the sole source of financial support of his family of eight during the tax years in question. Accordingly, the government's evidence met the McMullin test. Defendants produced no evidence to challenge the information reflected on the assessments. Therefore, judgment in the government's favor was warranted.

Defendants next contend the certificates of assessment were inadmissible hearsay evidence. They also contend the certificates were inadmissible because they are computerized summaries. Certificates of assessments fall within the public records exception to the rule against hearsay because they "qualify as [records], reports, ... or data compilations, in any form, of public offices or agencies, setting forth...matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Hughes v United States, 953 F2d 531, 539 (9th Cir 1992)(quoting Fed R Evid 803(8)). Official IRS documents, including those generated by computer, are admissible as public records. Id. at 540; see also United States v Hayes, 861 F2d 1225, 1228 (10th Cir 1988)(noting the "well established proposition" that data generated by computer may qualify under business records exception of Rule 803(6)). Accordingly, we determine the certificates of assessment were properly admitted.

Defendants further complain that they were denied discovery of the documents underlying the assessments. "We review orders relating to discovery for an abuse of discretion." Johnson ex rel. Johnson v Thompson, 971 F2d 1487, 1497 (10th Cir 1992), petition for cert. filed 61 USLW 3371 (US Nov 4, 1992)(No 92-779). During trial, the government's attorney stated that the government had complied with all of defendant's discovery requests. R. Vol III at 138-39. Defendants did not dispute the government's representation except to say they were really trying to discover information other than the supporting documents. Id. at 142-43.

Defendants also complain that no witness appeared to testify about the data underlying the assessments, yet they refused the district court's offer to make available two witnesses who executed the certificates of assessment. R. Vol. IV at 243-44. The district court found that defendants had adequate opportunity to ascertain the identity of any witness they wanted to call. Id. at 243. Defendants do not dispute the figures stated in the assessments, except to say that the government has not proven their accuracy to the defendant's satisfaction. Therefore, we perceive no abuse of discretion relating to discovery of the infor-

mation underlying the assessments.

IV. FRAUDULENT CONVEYANCE

The district court found that Mr. Brown had conveyed the business property to his wife with the intent to defraud the United States. R. Vol. II, doc. 107 at 6. Based on that finding, the district court set aside the transfer pursuant to Utah Code Ann 25-1-7 (1953)(currently codified at 25-6-5 (1989)), and ruled that Mr. Brown retained one-half undivided interest in the business property to which the federal tax liens attached. R Vol. II, doc 107 at 7.

Defendants allege several errors relative to the district court's order setting aside the business property conveyance: (a) the correct statute of limitations was for years after the transfer, as provided by Utah Code Ann. 25-6-10 (1989), not the six years provided by the federal statute for collection of tax after assessment, 26 USC 6502; (b) the government failed to prove it was a creditor; (c) the government failed to establish notice and demand was sent to defendants; (d) the Utah fraudulent conveyance statute, 25-1-7 (1953), permitting a future creditor to move to set aside a fraudulent conveyance, is unconstitutionally vague; (e) the government's liens did not attach to the property; and (f) a prerequisite to a finding of fraudulent conveyance under section 25-1-4 (1953)(currently codified at section 25-6-6 (1989)), was a finding that Mr. Brown was insolvent at the time of the conveyance or that he became insolvent because of the conveyance.

We conduct a de novo review of the district court's determination of state law. Mares v ConAgra Poultry Co. 971 F2d 429, 495 (10th Cir 1992). We review de novo the construction of federal statutes. FDIC v Canfield, 967 F2d 443, 445 (10th Cir), cert. dismissed 113 SCt 516 (1992).

The Utah four-year statute of limitatgions for fraudulent conveyances, section 25-6-10 (1989), conflicts with the federal law providing a six-year statute of limitations under 26 USC §6502. The Supremacy Clause, U.S. Const. art. VI, cl. 2, accords priority to federal rights "whenever they come in conflict with state law." Chapman v Houston Welfare Rights Org., 441 US 600, 613 (1979); accord Golden State Transit Corp. v City of Los Angeles, 493 US 103, 107 (1989). "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights. The same rule applies whether the United States brings its suit in its own court or in a state court." United States v Summerlin, 310 US 414, 416 (1940)(citations omitted).

The district court relied upon section 25-1-7 (1953) and Dahnken

Inc v Wilmarth, 726 P2d 420 (Utah 1986), in finding Mr. Brown had fraudulently conveyed his interest in the business property to his wife, and therefore, that Mr. Brown retained a one-half undivided interest in the property, subject to the federal tax liens. The district court properly employed state law to ascertain defendnts' interest in the property, then applied federal tax law to that interest. United States v National Bank of Commerce, 472 US 713, 722 (1985)("[S]tate law controls in determining the nature of the legal interest which the taxpayer had in the property [;]...tax consequences thenceforth are dictated by federal law.").

Defendants argue on appeal that the Utah statute permitting a future creditor to request a conveyance to be set aside as fraudulent, section 25-1-7 (1953), is unconstitutionally vague. The question of the constitutionality of the statute is not listed in the pretrial order as a disputed issue. Our review of the record does not reveal that the defendants raised this argument at the district court, and defendants fail to direct us to pertinent portions of the record. See Securities & Exc Comm'n v Thomas, 965 F2d 825, 826-27 (10th Cir 1992)(in counseled case, court would search the record for the requisite record support). Therefore, we decline to address the issue raised for the first time on appeal. See Hicks v Gates Rubber Co., 928 F2d 966, 970 (10th Cir 1991).

We next address defendants' claims that the government failed to prove it was a creditor, and that the assessment procedure was deficient. Proof that the government was a creditor was received at trial in the form of the assessment notices for the tax years in question. See Long v United States, 972 F2d 1174, 1181 (10th Cir 1992)(citing cases)(certificate of assessment prima facie evidence of valid assessment). Moreover, "a Certificate of Assessments and Payments is sufficient evidence that an assessment was made in the manner prescribed by [26 USC] 6203 and Treas Reg 301.6203-1." id

The government became a creditor on the dates the tax returns were due. 26 USC 6151(a)(taxpayer shall pay the tax at the time fixed for filing the return); Pan Am Van Lines v United States, 607 F2d 1299, 1301 (9th Cir 1979)(holding tax was due one the date the tax return was due); United States ve Thomassen, 610 FSupp 386, 391-92 (D Neb 1985)(same); see also Holywell Corp v Smith, 112 SCt 1021, 1028 (1992)("No tax liability becomes due under 6151 until the time required for making returns"). Therefore, we reject defendants' claims that the government was not a creditor and the assessment procedure did not comply with statutory requirements.

Defendants also claim that the liens did not attach to the property, primarily because title was transferred to Mrs. Brown's name prior to the notices of assessments, and prior to trial. A federal tax lien arises upon assessment for unpaid taxes, and attaches to all property belonging to the delinquent taxpayer. 26 USC 6321-6322. When the district court set aside the conveyance to Mrs. Brown, Mr. Brown's interest became subject to the liens.

Defendants next claim that because Mr. Brown was not insolvent prior to the conveyance of the business property to Mrs. Brown, and because the conveyance did not make him insolvent, Utah Code Ann. 25-6-6 (1989) precludes a finding that the conveyance was fraudulent. The district court set aside the conveyance of the business property pursuant to Utah Code Ann 25-1-7 (1953), not section 25-1-4 (1953)(currently section 25-6-6 (1989)). "Utah's Fraudulent Conveyance Act, 25-1-1, et seq., establishes several different grounds for setting aside a debtor's transfer of property as a fraudulent conveyance." Butler v Wilkinson, 740 P2d 1244, 1260 (Utah 1987)(emphasis added). Actual fraudulent intent is required to make a conveyance fraudulent under section 25-1-7, while a transfer by an insolvent debtor under section 25-1-4 requires no actual intent. Butler, 740 P2d at 1261. The district court's finding that the conveyance was fraudulent under section 25-1-7 does not conflict with the separate provisions of sectgion 25-1-4. Therefore, the district court's determination will not be set aside.

V. JURY TRIAL

Finally, defendants maintain they were entitled to a jury trail. A defendant in a suit brought by the government for collection or recovery of taxes is entitled to a jury trial. United States v Anderson, 584 F2d 369, 373 (10th Cir 1978). When the government seeks only to enforce its tax lien, an action sounding in equity, no right to a jury trial arises. United States v Annis 634 F2d 1270, 1272 (10th Cir 1980). Where, as here, the government seeks a money judgment and forclosure of tax liens, the taxpayer is entitled to a jury trial on the money judgment claim. McMullin 948 F2d at 1190.

Here, the government's evidence that Mr. Brown was indebted for unpaid taxes included the certificates of assessment and Mr. Brown's testimony that he alone had provided all of the financial support for his family during the tax years in question. Defendants presented no countervailing evidence. Under these circumstances, even if defendants had been granted a jury on the government's legal claims, the district court would have been required to direct a verdict on those claims in the government's favor. Therefore, any error in denying defendants a jury trial was

harmless. Id. at 1192.

All pending motions are DENIED.

The judgment of the United States District Court for the District Court of Utah is AFFIRMED. The mandate shall issue forthwith. Dec. 23, 1992

Entered for the Court Dale E Saffels Senior District Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

United States of America, Plaintiff-Counter-Claim Defendant-Appellee, v L. Shyrl Brown and Ila D. Brown, Defendants-Counter-Claimants-Appellants.

Number 91-4175 (DC No 89-C-143J)(D Utah)

ORDER Before Moore and Tacha, Circuit Judges and Saffels, Senior District Judge. Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

This matter is before the court on appellants' petition for rehearing.

The materials submitted by appellants have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

Entered for the Court Robert L Hoecker, Clerk by Barbara Schermerhorn Deputy Clerk Feb. 12, 1993

FOOTNOTES

1. The district court granted the parties' requests to stay the sale of the property.

2. The government also claimed that the defendants' residential real property, held from the date of purchase in Mrs. Brown's name, was subject to foreclosure and sale for Mr. Brown's tax liability, but the district court declined to find a fraudulent conveyance of the residential property. The government filed a notice of appeal, but subsequently voluntarily dismissed its appeal.

3. The statute was subsequently amended to provide for a ten-year statute of limitations. 26 USC 6502(a)(1990).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION. United States of America, Plaintiff, L. Shyrl Brown, et al., Defendant.

MEMORANDUM OPINION Civil No. 89-C-143J

INTRODUCTION

The above captioned matter came on for trial on February 4 and 5, 1991. Plaintiff United States ("plaintiff") claimed that defendant L. Shyrl Brown ("Mr. Brown") was indebted to the United States for unpaid federal income taxes. To help satisfy Mr. Brown's alleged debt, plaintiff sought to foreclose federal tax liens on two parcels of real property (hereinafter referred to as the "residential" and "business" properties), owned by defendant Ila Del Brown ("Mrs. Brown").

At trial, the court found that plaintiff had properly assessed the income taxes in question, and that Mr. Brown had failed to pay such taxes when due. Specifically, the court determined that the amounts claimed against Mr. Brown for the calendar years 1971, 1972, 1973, 1977, 1978, 1979, 1980 and 1982, were correct, and that the United States was entitled to judgment thereon. As to the residential property, the court found that the land was legitimately placed in the name of Mrs. Brown, and therefore, that the property was unreachable. With respect to the business property, the court took under advisement the issue of whether the land was subject to federal tax liens.

FACTS

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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FACTS

This case involves two parcels of real property, both of which are located in Richfield, Utah. Mr. Brown's residence is located on one parcel, and his business is located on the other. The business property, which is used solely by Mr. Brown for the practice of dentistry, is the subject of this memorandum decision.

On March 24, 1972, the Browns recorded a deed with the Sevier County Recorder. The deed conveyed the business property from Mr. and Mrs. Brown, collectively, to Mrs. Brown individually. While Mr. Brown claims he conveyed his interest in

the property as a gift, plaintiff contend that Mr. Brown fraudulently conveyed his property interest to evade present and future tax liabilities. Mr. Brown failed to pay federal income taxes for the years 1971, 1972, 1973, 1977, 1978, 1979, 1980 and 1982.

DISCUSSION

Plaintiff claims Mr. Brown fraudulently conveyed his undivided one-half interest in the business property to Mrs. Brown in violation of Utah Code Ann. ("UCA") 25-1-7 of the Utah Uniform Fraudulent Conveyance Act (the "Act") . Section 25-1-7 states:

Every conveyance made, and every obligatgion incurred, with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors.

UCA 25-1-7 (1953). Thus, to prove a violation of the UCA, plaintiff must show that it is a "creditor", and that Mr. Brown conveyed the business property with "actual intent" to defraud the United States.

A. The United States as a Creditor

At trial, plaintiff argued that, for purposes of UCA § 25-1-7, the United States is a creditor of Mr. Brown for the years 1971, 1972, 1973, 1977, 1978, 1979, 1980 and 1982. In contrast, Mr. Brown asserted that plaintiff is not a creditor, or in the alternative, even if plaintiff is a creditor, it did not become so until May, 1983, when the taxes were actually assessed. The court finds that plaintiff is a creditor for purposes of USC 25-1-7, and that plaintiff's status as a creditor is determined by the date the taxes were due, not when they were assessed. See United States v Thomassen, 610 FSupp 386 (D Neb 1985).

In Thomassen, the United States sought to set aside a conveyance that occurred after the date in which defendant's delinquent tax return was required to be filed. The court determined that, pursuant to 26 USC §6151(a), the United States became an existing creditor as of the date prescribed by law for the filing of the return. Thus, the court found that "income tax liability matures on the day the return is required to be filed and the correct amount of the tax liability becomes due at that time regardless of when the deficiency assessment may be made." Id. at 392 (citations ommitted)(emphasis in original).

Based on the foregoing, this court likewise finds that plaintiff had an existing claim against Mr. Brown beginning on April 15, 1972, the date on which Mr. Brown's 1971 federal income tax

return was due to be filed. The correct amount of tax liability became due to be filed. The correct amount of tax liability became due at the time, regardless of when the deficiency assessment was actually made. Therefore, as of that date, plaintiff was a creditor of Mr. Brown for unpaid federal income taxes.

Defendant contends that even as creditors, plaintiff cannot reach a conveyance that occurred on March 24, 1972, almost a month prior to the April 15, tax deadline. The court disagrees, and finds that plaintiff was a future creditor of Mr. Brown on March 24, 1972. Although there is no authority defining the term "future creditor" as that phrase is used in UCA 25-1-7, the context of that term makes it clear that a future creditor is a creditor whose claim came into existence after the conveyance at issue. Under early fraudulent conveyance statutes, as well as the common law, a creditor did not have standing to set aside a fraudulent conveyance unless the creditor was a creditor at the time the conveyance occurred. See generally, 38 ALR 3d 597. In more recent decisions, however, courts have allowed creditors to maintain fraudulent conveyance actions even if the obligation did not come into existence until after the conveyance had occurred. For example, in Studley v Lefrak, 412 NYS2d 901, 905 (N.Y.App 1979) the court found:

Under the statute a creditor has standing to maintain an action to set aside a fraudulent transfer though his debt may not have been in existence at the time of transfer.

Utah Code Ann. 25-1-7, by using the term future creditors, appears to have adopted this more recent view. Accordingly, although plaintiff's claim against Mr. Brown did not come into existence until after the conveyance of the business property, plaintiff nevertheless has standing to sue under UCA "25-1-7 as a future creditor.

B. Intent to Defraud

The court further finds that Mr. Brown conveyed the property with the intent to defraud the United States. Although "actual" fraudulent intent must be shown to hold a conveyance fraudulent pursuant to UCA 25-1-7, the existence of such intent may be inferred from the presence indicia of fraud, or badges of fraud. See Dahnken, Inc of Salt Lake City v Wilmarth, 726 P2d 420 (Utah 1986). The existence of one or more badges of fraud does not necessarily constitute fraud per se, nor is the presence of one or more of the elements conclusive. However, the occurrence of several elements will ordinarily establish that a particular conveyance was fraudulent. See Dahnken, 726 P2d at 423.

Such badges of fraud include: the insolvency of the grantor;

inadequate consideration; the transfer of all of the debtor's property; that the transfer was made in anticipation of a suit or liabilities; a close relationship between the transferror and the transferee; that the conveyance was not made in the ordinary course of business; the retention of possession by the transferor; the reservation of an interest or benefit by the grantor; and, that the state taxes or real property taxes are paid by the transferor. See Butler v Wilkinson, 740 P2d 1244 (Utah 1987); Dahnken, 726 P2d at 423; Meyer v Great American Corp 569 P2d 1094 (Utah 1977).

As evidenced at trial, the conveyance of the business property from Mr. and Mrs. Brown, collectively, to Mrs. Brown individually, was done with the intent to hinder or delay the United States from collecting Mr. Brown's delinquent income tax. The conveyance was tainted with numerous badges of fraud. Mr. Brown, who has no other assets of his own, conveyed the property for no consideration. While the conveyance was made to his wife alone, he retained sole possession of the property for the continuance of his dental practice. Mr. Brown continued also continued (sic) to pay all state and property taxes on the property. Finally, Mr. Brown himself admitted that the very reason he conveyed the property to Mrs. Brown was to avoid potential claims against him. Under these circumstances, the court must infer that Mr. Brown acted with actual intent to defraud his creditors.

Having found that plaintiff is a creditor of Mr. Brown, and that the conveyance of the business property was done with the intent to defraud his creditors, the court finds that Mr. Brown's March 24, 1972, conveyance violated USC /25-1-7. Because the conveyance was fraudulent, the transaction is set aside, and Mr. Brown retains a one-half undivided interest in the business property. Therefore, pursuant to 26 USC *6321, tax liens arose in favor of the United States aginst Mr. Brown's interest in the business property as of the date his federal income taxes were assessed.

This opinion and order will constitute findings of fact and conclusions of law. Counsel for plaintiff to prepare and submit an appropriate form of judgment to the court by not later then (sic) July 23, 1991.

IT IS SO ORDERED Dated this 15 day of July, 1991. BY THE COURT /s/Bruce S. Jenkins, Chief Judge United States District Court.

FOOTNOTES

1. The court is troubled as to how the United States can bring a claim for delinquent taxes dating back as far as 18 years.

However, under United States v Decker, 241 FSupp 283 (D Ariz 1965), the United States is not bound by Utah's three-year statute of limitations, but by the statute of limitations set forth by the Internal Revenue Code. See 26 USC/6502. Section 6502 authorizes the government to bring a cause of action for the collection of taxes within six years from the date of assessment. Accordingly, the statute of limitations in the case did not begin to run until 1983.

2. The Utah Fraudulent Conveyance Act, Sections 25-1-1 to 16 was repealed on April 25, 1988. See Laws 1988, ch 59,/16.

3. The government made the following federal income tax assessments

1971, 72, 73 May 4, 1983; 1977 August 19, 1985; 1978 May 20, 1985; 1979, 80 May 20, 1985; 1981, 82 July 1, 1985

4. Section 6151(a) states in pertinent part: "...when a return is required under this title or regulation, the person required to make such a return shall, without assessment or notice and demand from the secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return..."

5. Section 6321 states: If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable panalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION United States of America, Plaintiff, v L. Shyrl Brown, et al Defendant. Civil No. 89C-143J JUDGMENT, ORDER OF FORECLOSURE AND ORDER OF SALE

This matter came for trial before United States District Judge Bruce S. Jenkins on February 4 and 5, 1991 with Kirk C. Lusty and John Pirkle representing the United States and L. Shyrl Brown and Ila Dell Brown appearing pro se. The court previously entered its Memorandum Opinion and Order. Based on the Memorandum Opinion and Order judgment is entered as follows:

1. Against L. Shyrl Brown and in favor of the United States in the sum of $190,404.89, plus interest and statutory additions

as provided by law.

2. Foreclosing the Federal tax liens on the real property located at 46 West 100 North, Richfield, Utah. The legal description of that property is: Comm at a point 13.5 ft E of SW Cor of Lot 1 Block 45, Plat "A", Richfield City Survey, N 48.9 ft, E 16 ft 8 in S 48.9 ft, W 16 ft 8 in, to beg. containing approximatgely 818 square feet, situated in the Northwest quarter of the Southwest quarter of Section 25, Township 23 South, Range 3 West, Salt lake Base and Meridian.

3. That the United States Marshal (sic) sell the real property identified in paragraph 2 and distribute the proceeds as follows; (a) First, to the costs of such sale; (b) Second, to the costs of this action; (c) Third, one-half to Defendant Ila Dell Brown and one-half to the United States to be applied to the federal tax liabilities set forth in paragraph 1; and (d) Any remaining sum to defendant L. Shyrl Brown.

4. This order of Sale shall act as a Writ of Execution. Dated this 24 Day of Sept, 1991.

BY THE COURT /s/ Bruce S. Jenkins United States District Judge.

UTAH CODE PROVIDES Jurisdiction is hereby ceded to the United States in, to and over any and all lands or territory within this state which have heretofore been acquired by the United States by purchase, condemnation or otherwise for military or naval purposes and for forts, magazines, arsenals, dockyards and other needful buildings of every kind whenever authorized by Act of Congress, and in, to and over any and all lands or territory within this state now held by the United States under lese, use permit, or reserved from the public domain for any of the purposes aforesaid; this state, however, reserving the right to execute its process, both criminal and civil, within such territory. The jurisdiction so ceded shall continue so long as the United States shall own, hold or reserve land for any of the aforesaid purposes, or in connection therewith and no longer. Utah Code, 63-8-1.

UNITED STATES CONSTITUTION PROVIDES:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to

exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dockyards, and other needful Buildings; -And Art I, Sec 8, Cl 17

Fifth Amendment; No person shall...be deprived of life, liberty or property without due process of law;...

Seventh Amendment; In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

INTERNAL REVENUE CODE 26 US Code provides:

The Secretary is authorized and required to make the inquiries, determinations and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following: (1) The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title.

26 USC 6201

(1) If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise. (2) Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

26 USC 6020(b)

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

26 USC 7401

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to

and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

26 USC 7402

In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

26 USC 7403

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of a judgment or decree; 28 USCS 1254.

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from import or tonnage except matters within the jurisdiction of the court of International Trade. 28 USCA 1340.

Except as otherwise provided by Act of Congress, the district court shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress. 28 USCS 1345.

THE CODE OF FEDERAL REGULATIONS provides:

The district director is authorized and required to make all inquiries necessary to the determination and assessment of all taxes imposed by the Internal Revenue Code of 1954 or any prior internal revenue law. The district director is further authorized and required, and the director of the regional service center is authorized, to make the determinations and the assessments of such taxes. However, certain inquiries and determinations are, by direction of the Commissioner, made by other officials, such as the assistant regional commissioners. The term 'taxes' includes interest, additional amounts, additions to the taxes and assessable penalties. The authority of the district director and the director of the regional service center to make assessments includes the following: (1) The district director or the director of the regional service center shall assess all taxes determined by the

taxpayer or by the district director or the director of the regional service center and disclosed on a return or list. (2)(i) Without the use of the proper stamp; (a) Any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof, or (b) Any transaction or act upon which a tax is required to be paid by means of a stamp occurs; the district director, upon such information as he can obtain, must estimate the amount of the tax which has not been paid and the district director or director of the regional service center must make assessment therefor upon the person the district director determines to be liable for the tax. However, the district director or the director of the regional service center may not assess any tax which is payable by stamp unless the taxpayer fails to pay such tax at the time and in the manner provided by law or regulations. (ii) If a taxpayer gives a check or money order as payment for stamps but the check or money order is not paid upon presentment, then the district director or the director of the regional service center shall assess the amount of the check or money order against the taxpayer as if it were a tax due at the time the check or money order was received by the district director.

26 CFR 301.6201-1.